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No. 82-654

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ATLAS TILE & MARBLE COMPANY and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioners,

v.

JAMES R. SHAHADY

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, U.S. DEPARTMENT OF LABOR,
Respondents.

PRIVATE PARTY RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

I. IN A CASE ARISING UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, IF A PHYSICIAN SELECTED BY AN INSURANCE CARRIER DISCHARGES A CLAIMANT AND THAT CLAIMANT THEN PROCURES NECESSARY MEDICAL TREATMENT, SHOULD THE INSURANCE CARRIER BE HELD LIABLE FOR THE COSTS OF THAT NECESSARY TREATMENT DESPITE THE CLAIMANT'S FAILURE TO FORMALLY REQUEST A CHANGE OF PHYSICIANS?

II. IN SUCH A CIRCUMSTANCE, IS THE TERMINATION OF ACTIVE MEDICAL TREATMENT AND DISCHARGE BY THE PHYSICIAN TO WHOM CLAIMANT IS REFERRED BY THE EMPLOYER DEEMED TO CONSTITUTE A REFUSAL OR NEGLECT BY THE EMPLOYER TO PROVIDE OR AUTHORIZE MEDICAL CARE OR TREATMENT UNDER THE ACT?

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JURISDICTION

The Court of Appeals for the District of Columbia Circuit had jurisdiction under 33 U.S.C. § 921(c) (1976 Ed.). The judgment of the Court of Appeals was entered on June 4, 1982 and petitioner's motion for rehearing was denied on July 16, 1982. The petition for certiorari was filed within 90 days of the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

United States Code, Title 33:

§ 907. Medical services and supplies.

(a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

(b) The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this Act as hereinafter provided. If, due to the nature of the injury, the employee is unable to select his physician and the nature of the injury requires immediate medical treatment and care, the employer shall select a physician for him. The Secretary shall actively supervise the medical care rendered to injured employees, shall require periodic reports as to the medical care being rendered to injured employees, shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished, and may, on his own initiative or at the request of the employer, order a change of physicians, or hospitals when in his judgment such change is desirable or necessary in the interest of the employee. Change of physicians at the request of employees shall be permitted in accordance with regulations of the Secretary.

(c) The Secretary may designate the physicians who are authorized to render medical care under the Act. The names of physicians so designated in the community shall be made available to employees through posting or in such other forms as the Secretary may prescribe.

(d) An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless he shall have requested the employer to furnish such treatment or services, or to authorize provision of medical or surgical services by the physician selected by the employee, and the employer shall have refused or neglected to do so, or unless the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize the same; nor shall any claim for medical or surgical treatment be valid and enforceable, as aginst such employer unless within ten days following the first treatment the physician giving such treatment be valid and enforceable, as against Secretary a report of such injury and treatment, on a form prescribed by the Secretary. The Secretary may, however, excuse the failure to furnish such report within ten days when he finds it to be in the interest of justice to do so, and he may upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee. If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

(e) In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a

physician employed or selected by the Secretary and to obtain from such physician a report containing his estimate of the employee's physical impairment and such other information as may be appropriate. Any party who is dissatisfied with such report may request a review or reexamination of the employee by one or more different physicians employed or selected by the Secretary. The Secretary shall order such review or reexamination unless he finds that it is clearly unwarranted. Such review or reexamination shall be completed within two weeks from the date ordered unless the Secretary finds that because of extraordinary circumstances a longer period is required. The Secretary shall have the power in his discretion to charge the cost of examination or review under this subsection to the employer, if he is a self-insurer, or to the insurance company which is carrying the risk, in appropriate cases, or to the special fund in section 44.

(f) An employee shall submit to a physical examination under subsection (e) at such place as the Secretary may require. The place, or places [sic] shall be designated by the Secretary and shall be reasonably convenient for the employee. No physician selected by the employer, carrier, or employee shall be present at or participate in any manner in such examination, nor shall conclusions of such physicians as to the nature or extent of impairment or the cause of impairment be available to the examining physician unless otherwise ordered, for good cause, by the Secretary. Such employer or carrier shall, upon request, be entitled to have the employee examined immediately thereafter and upon the same premises by a qualified physician or physicians in the presence of such physician as the employee

may select, if any. Proceedings shall be suspended and no compensation shall be payable for period during which the employee may refuse to submit to examination.

Code of Federal Regulations. Title 20:

§ 702.403. Employee's right to choose physician; limitations.

The employee shall have the right to choose his attending physician from among those authorized by the Director, OWCP, to furnish such care and treatment. In determining the choice of a physician, consideration must be given to availability, the employee's condition and the method and means of transportation. Generally 25 miles from the place of injury, or the employee's home is a reasonable distance to travel, but other pertinent factors must also be taken into consideration.

§ 702.406 Change of physicians; non-emergencies.

Whenever the employee has made his initial, free choice of an attending physician, he may not thereafter change physicians without the prior written consent of the employer (or carrier) or the deputy commissioner. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

§ 702.407 Supervision of medical care.

The Director, OWCP, through the deputy commissioners and their designees, shall actively

supervise the medical care of an injured employee covered by the Act. Such supervision shall include:

(a) The requirement that periodic reports on the medical care being rendered be filed in the office of the deputy commissioner, the frequency thereof being determined by order of the deputy commissioner or sound judgment of the attending physician as the nature of the injury may dictate;

(b) The determination of the necessity, character and sufficiency of any medical care furnished or to be furnished the employee;

(c) The determination of whether a change of physicians, hospitals or other persons or locales providing treatment should be made or is necessary;

(d) The further evaluation of medical questions arising in any case under the Act, with respect to the nature and extent of the covered injury, and the medical care required therefor.

§ 702.418 Procedure for requesting medical care; employee's duty to notify employer.

As soon as practicable, but within 30 days after occurrence of an injury covered by the Act, or within 30 days after an employee becomes aware, or in the exercise of reasonable diligence should be aware, of the relationship between an injury or disease and his employment, the injured employee or someone on his behalf shall give written notice thereof to the deputy commissioner having jurisdiction over the place where the injury occurred and to the employer. If a form has been prescribed for such purpose it shall be used, if available and practicable under

the circumstances. Notices filed under Subpart B of this part, if on the form prescribed by the Director for such purpose, satisfy the written notice requirements of this subpart.

§ 702.419 Action by employer upon acquiring knowledge or being given notice of injury.

Whenever an employer acquires knowledge of an employee's injury, through receipt of a written notice or otherwise, said employer shall forthwith authorize, in writing, appropriate medical care. If a form is prescribed for this purpose it shall be used whenever practicable.

§ 702.420 Issuance of authorization; binding effect upon insurance carrier.

The issuance of an authorization for treatment by the employer shall bind his insurance carrier to furnish and pay for such care and services.

§ 702.421 Effect of failure to obtain initial authorization.

An employee shall not be entitled to recover for medical services and supplies unless he shall have first requested authorization from his employer therefor. This prohibition shall not apply in emergency situations, nor shall it apply in cases where the employer (including the superintendent, foreman, or other person having charge of the work and having knowledge of the injury) refuses or neglects to authorize such care when requested by the employee.

§ 702.422 Effect of failure to report on medical care after initial authorization.

(a) Notwithstanding that medical care is properly obtained in accordance with these regulations, the employer and his insurance carrier

shall not be liable for the expense thereof unless the physician rendering such initial care or services furnishes a report thereof to the employer and to the deputy commissioner having jurisdiction. The report required by this section shall be furnished within 10 days following the date of first treatment. The report shall be upon a form prescribed by the Director for such purpose.

(b) For good cause shown, the deputy commissioner or administrative law judge may excuse the failure to file the report within 10 days, and further, may make an award for the reasonable value of such medical care.

STATEMENT OF THE CASE

On November 19, 1975, private party respondent, James R. Shahady,[1] was employed by the Atlas Tile & Marble Company, petitioner herein. At that time, the employer's insurance carrier was the Hartford Accident and Indemnity Co., also a petitioner herein.

On that day, respondent was injured when he jumped from an eighteen inch high platform, struck a pipe protruding from an unfinished floor, fell and landed on his left knee. The impact cut the knee, but not to such an extent that Mr. Shahady felt it necessary to seek medical attention. However, the next day, respondent went to the Northeast Industrial Clinic, where the staff gave Mr. Shahady a tetanus shot and pain pills and x-rayed the knee. He was told he could return to work.

Mr. Shahady returned to work, but by January 1976, the pain and swelling forced him to seek the aid of Dr.

[1]Mr. Shahady will be referred to as "respondent" or Mr. Shahady.

Bernard Pecson, his family physician.[2] Dr. Pecson sent respondent to Doctors Hospital in Prince Georges County for an arthrogram. The arthrogram showed that a baker's cyst had developed and that both the lateral and medial minisci (cartilage) were torn. Dr. Pecson felt that the tears were not severe enough to operate and Mr. Shahady returned to work. Respondent returned with further complaints of pain and swelling on August 4, 1976 and again on August 16, 1976, at which time Mr. Shahady was informed that surgery of the left knee might be indicated.

The Hartford Accident and Indemnity Company, petitioner herein, requested, however, that respondent see Dr. Marvin M. Gibson, an orthopedic surgeon.[3] Mr. Shahady complied, first visiting Dr. Gibson on October 8, 1976. Dr. Gibson diagnosed tears of the lateral and medial menisci, relaxation of the medial collateral ligament and a baker's cyst, all of the left knee. However, the doctor treated Mr. Shahady conservatively. In compliance with Dr. Gibson's requests, respondent returned for visits in November 1976 and January 1977. Dr. Gibson recommended that respondent continue to work, that he continue to exercise his knee and advised him to consider an arthrotomy if he became unable to work. Finally, Mr. Shahady was admitted to Doctors Hospital by Dr. Gibson on April 1, 1977 because he was unable to work. Respondent underwent surgery on April 2, 1977. Dr. Gibson reported having removed the popliteal fasci (baker's cyst) and the medial and lateral menisci of the left knee. Although Dr. Gibson had noted during surgery that the

[2]The administrative law judge found Dr. Pecson to be respondent's "initial free choice." (App. p. 48A).

[3]Respondent notes that there is nothing in the record to support petitioner's statement that respondent was sent to Dr. Gibson "because Dr. Pecson did not submit a medical report pursuant to 33 U.S.C. § 907(c)." (Petition, p. 6).

collateral ligament was loose, he did not surgically correct it. Dr. Gibson followed Mr. Shahady's recovery from April 1977 to April 1978, during which time Dr. Gibson allowed respondent to work.

By April 1978, Mr. Shahady's knee worsened to the point where he was unable to bend down or get up while working. The knee was locking and giving way. Respondent saw Dr. Gibson for the last time on April 14, 1978, and again related the problems he was experiencing. During that visit, respondent and Dr. Gibson had a disagreement. Dr. Gibson asked respondent when "he had received his medical degree" and told respondent that there was nothing wrong with his leg.[4]

Petitioner again sought the aid of Dr. Pecson, who sent Mr. Shahady to Doctors Hospital for a second arthrogram, which again showed a ruptured medial meniscus and a baker's cyst. The second arthrogram was virtually identical to the first; it showed the same knee ailments for which Dr. Gibson had allegedly performed corrective surgery. On June 25, 1978, Dr. Pecson admitted Mr. Shahady to Doctors Hospital and, being unable to perform surgery, referred him to a board-certified orthopedic specialist, Dr. Gerald D. Schuster.

Upon entering Doctors Hospital, Mr. Shahady informed the admissions personnel that Hartford Accident and Indemnity Company was the responsible carrier. In accordance with normal procedure, the hospital called Hartford to inquire into petitioner's coverage. The petitioner denied responsibility.

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[4]It was this incident which the Court of Appeals held to be a refusal under "judicial and BRB precedent." *Shahady v. Atlas Tile and Marble Co.*, 682 F.2d 968, 970 (D.C. Cir 1982) (App. 9a).

Dr. Schuster diagnosed a marked internal derangement of the left knee requiring immediate surgery. On June 29, 1978, Dr. Schuster operated on Mr. Shahady's knee. He repaired the loose medial collateral ligament and the anterior cruciate ligament which Dr. Gibson had failed to do during the first operation. He excised the torn portion of the medial meniscus which Dr. Gibson had allegedly removed during the first operation, and also removed bone spurs.[5] Respondent remained in the hospital for seventeen days.

Dr. Schuster continued to follow Mr. Shahady's recovery. Unfortunately, by November 6, 1978, respondent had lost mobility in his left knee, and was admitted to Doctors Hospital for closed knee manipulation. Mr. Shahady responded well and was discharged on November 11, 1978. Prior to admitting respondent, Doctors Hospital again called Hartford to check on coverage and the employer's carrier again denied that it would assume expenses for Mr. Shahady's further medical treatment. Mr. Shahady remained in the hospital with all attendant costs for an additional four days. Since November 1978, Mr. Shahady has continued to have problems with his knee. It continues to swell, has lost strength and has had to be drained. At the time of the administrative hearing, Mr. Shahady had not returned to work.

Respondent filed a claim for benefits under the Longshoremen's and Harbor Workers' Act, as amended, 33 U.S.C. § 901 *et seq.* (1976) as extended to cover employees under the District of Columbia Workers' Compensation Act, D.C. Code § 36-501 *et seq,* seeking payment for the medical expenses of Drs. Pecson, Schuster and Edelson, Dr. Schuster's assistant.

[5]Subsequently, respondent brought a malpractice action against Dr. Gibson, *Shahady v. Gibson*, C.A. No. 4461-80 (Super. Ct. D.C.).

OPINIONS AND DECISIONS BELOW

A formal hearing was held on October 19, 1979 before an Administrative Law Judge who denied the claim for reimbursement for medical expenses. The Opinion is contained in Appendix I, p. 44a.

On appeal, the Benefits Review Board, one member dissenting, affirmed the decision of the Administrative Law Judge. In so doing, the Board overruled its prior holding in *Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515, BRB No. 78-154 (1978), which held that a claimant was entitled to reimbursement for medical expenses incurred from treatment rendered by his "initial free choice" of treating physician, 33 U.S.C. § 907(b), even if there had been no prior request by the claimant to his employer. The opinion of the Board, dated June 11, 1981, appears as Appendix H. p. 38a.

Respondent then filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 33 U.S.C. § 921(c). The Director of the Office of Workers' Compensation Programs of the United States Department of Labor, who was not named as an agency respondent in claimant's petition, moved to amend and reform the caption to be included as a respondent (although aligning himself with Mr. Shahady). The caption of the case was reformed in accordance with a decision of the United States Court of Appeals. *Shahady v. Atlas Tile & Marble Company,* 673 F.2d 479 (D.C. Cir. 1982) (Appendix F., p. 12a)

Respondent raised five issues before the Court of Appeals. The Federal respondent addressed two of those issues on behalf of Mr. Shahady's behalf.

On June 4, 1982, the Court of Appeals reversed the Benefits Review Board and the Administrative Law Judge

and held the employer and carrier responsible for the medical bills in question. The Court of Appeals held that the actions by Dr. Gibson constituted a refusal by the petitioner to provide medical treatment, and that all subsequent necessary treatment procured by respondent is reimbursable, citing *Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908, 911 (5th Cir. 1971). *Buckhaults v. Shippers Stevedore Co.*, 2 BRBS 277, BRB No. 75-132 (1975); *Walker v. AAF Exchange Service*, 5 BRBS 500, BRB No. 76-185 (1977); and *Kilson v. Sun Shipbuilding & Dry Dock Co.*, 2 BRBS 172, BRB No. 75-127 (1975).

The Court of Appeals also held that Drs. Pecson's, Schuster's and Edelson's failure to file timely reports should have been excused, citing *Buckhaults, supra* at 280, and that the failure to do so was an abuse of discretion.

The Court did not reach the question whether, in the absence of a refusal attributable to the employer to provide necessary medical treatment, the Act would have required respondent to request his employer's authorization for the medical services in question.[6] That decision, dated June 4, 1982 appears as Appendix E, p. 7a.

Petitioners filed a timely Petition for Rehearing and Petition for Rehearing *en banc* with the Court of Appeals. On July 16, 1982, the Petitions for Rehearing were denied by the Court of Appeals without opinion. (Appendix B., p. 3a, Appendix C, p. 5a).

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[6]Petitioner's statement that the Court of Appeals "ignored" respondent's failure to comply with aplicable provisions for changing treating physicians, (Petition p. 8.), is curious. The entire thrust of the decision was that such a failure is excused when the carrier is responsible for inadequate medical treatment. This finding is consistent with both the "humanitarian purpose of the Act." *Leyden v. Capitol Reclamation*, 2 BRBS 24 (1975) *aff'd mem.* 547 F.2d 706 (D.C. Cir. 1977) and the doctrine of equitable estoppel.

SUMMARY OF ARGUMENT

The petition for *certiorari* should not be granted because the Court of Appeals merely applied a long standing, settled and narrow doctrine: Where the employer's physician refuses to provide adequate medical treatment, the employee must be reimbursed for all subsequent, necessary treatment he procures, regardless of his failure to comply with the requirements of 33 U.S.C. § 907(d) and the regulations promulgated thereunder. See 20 C.F.R. § 702.418 *et seq.* Similarly, that the employer's doctor's actions can be imputed to the employer is a well established principle under prior judicial and administrative decisions. The refusal by an employer, through his physician, to provide necessary medical treatment was properly held to excuse the failure of the respondent's doctors to file medical reports. Such a finding is wholly consistent with the requirement of 33 U.S.C. § 907(d) that such a waiver be "in the interest of justice", and with the requirement of 20 C.F.R. § 702.422 that such a waiver be granted "good cause shown".

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS MERELY APPLIED LONG ESTABLISHED PRECEDENT WHICH HOLDS THAT AN EMPLOYER/CARRIER MAY NOT REFUSE TO PAY FOR NECESSARY MEDICAL TREATMENT PROCURED BY AN EMPLOYEE WHERE THAT CARRIER'S DOCTOR HAD REFUSED TO PROVIDE TREATMENT.

Throughout its petition, petitioner has overstated the breadth of the Court of Appeals' ruling. The Court of Appeals holding only applies when 1) the employer/carrier sends an employee to a doctor of its own choosing; 2) that doctor wrongfully refuses to provide treatment; 3) the employee then procures necessary treatment related to the injury; 4) without first seeking approval for the change of physicians.[7] Only under these circumstances is an employer responsible for unauthorized medical treatment.

Contrary to what the petitioner states, more is needed than to have the "claimant disagree" (Petition, p. 10) with the doctor for this exception to apply. Excusing a failure to request a change of physicians is consistent with the "humanitarian purpose of the Act", *Wheatley v. Adler*, 407 F.2d 307, 314 (D.C. Cir. 1968)) (en banc), as well as common sense. If the employer's physician has said that no further treatment is necessary, it will certainly oppose a change of physicians in accordance with Section 7(b) of

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[7]Petitioner's statement that the "only difference of opinion [between Drs. Gibson and Schuster] was therefore one of medical judgment" (Petition, p. 10, fn2) is clearly erroneous. During the second operation, Dr. Schuster removed the same medical meniscus that Dr. Gibson had claimed to have removed, and repaired a ligament which Dr. Gibson had left alone.

the Act, 33 U.S.C. § 907(b). Thus, such a request would be a futile, time consuming and unproductive gesture.

Petitioner's statement that the Court of Appeals decision will result in "prejudice to the employer and carrier" (Petition, p. 10) again ignores the narrow scope of the decision. Again, under the administrative and judicial precedent relied on by the Court of Appeals, the employer is only liable for necessary treatment procured by an employee after the physician selected by the employer/carrier wrongfully refuses to provide treatment. Thus, the employee is not given "free reign to go anywhere he chooses," (Petition, p. 10) but is narrowly constrained in his actions.[8]

Thus, the Court of Appeals merely applied existing law. In reversing the agency, the Court noted that "the BRB failed to act in accordance with basic tenets of administrative law: by reaching an unsupported determination without distinguishing its own precedent." 682 F.2d at 970, (App. 10a). Given the narrow scope of this holding, and the application of well established precedent, this Court should decline this opportunity to review the decision of the U.S. Court of Appeals for the District of Columbia Circuit. Furthermore, petitioner's statement that "the Court of Appeals' designation of Dr. Gibson as 'employer's physician' and its attribution to the employer of Dr. Gibson's conduct find no basis in the law of agency and ignores the independent nature of Dr. Gibson's practice" (Petition, p. 14, fn3) is contrary to law. Section 14N

[8]In addition to being necessary, all charges must be consistent with prevailing charges in the medical community. 20 C.F.R. § 702.413.

of the Restatement, Second, of Agency provides that "one who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor."

II. PETITIONER HAS FAILED TO RAISE AN IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner's second argument is that an important question of federal law has been raised; yet it fails to cite a single case which conflicts with the decision below. There is only one explanation for this failure – neither the Benefits Review Board nor any Court of Appeals has seen fit to reject the doctrine laid down in *Atlantic and Gulf Stevedores v. Neuman,* 440 F.2d 908 (5th Cir. 1971). Moreover, the cases cited by petitioner (Petition, pp. 18-19) are not distinguishable, but actually support respondent's argument.

Maryland Shipbuilding and Dry Dock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979) involved a claimant who was injured, treated and released from treatment, but whose employer had not refused to provide treatment. When his condition worsened, claimant sought the advice of his *lawyer* who referred claimant to a doctor. Furthermore, he refused to submit to an examination by a "company" doctor in whom he lacked confidence. *Jenkins, supra,* at 405. Claimant was denied treatment because of his refusal to submit to an exam, as well as his failure to seek authorization. Thus, *Jenkins* did not fit into any previously established exceptions to the filing requirements, as respondent did in the instant action. Also, as the *Jenkins* court noted, the equities of the case were in the employer's favor.

Nardella v., Campbell Machine, 525 F.2d 46 (9th Cir. 1975) is also distinguishable. *Nardella* involved a pre-amendment case where the Court held that the claimant, who had not been refused treatment, could not recover the cost of medical expenses where no medical reports had been filed and where those expenses were incurred after the claimant had recovered from his illness.

Jackson v. Navy Exchange, 9 BRBS 437, BRB No. 77-373 (1978), involved a situation where the *employee's* doctor allegedly misdiagnosed the claimant's condition. The claimant then saw numerous other doctors without authorization. The Board distinguished the facts of that case from situations where the claimant's condition was misdiagnosed by a doctor supplied by the employer. *Jackson, supra* at 439. There can be no doubt that the respondent's final visit to the employer's physician constituted a request for treatment under *Jackson.* Thus, *Jackson* actually supports the Court of Appeals holding in the instant action as well as respondent's position.

Similarly, petitioner's attack on the Court of Appeals' reliance on *Atlantic & Gulf Stevedoring v. Neuman,* 440 F.2d 908 (5th Cir. 1971) is myopic. What petitioner has failed to point out is that the *Neuman* opinion has been adopted by the Benefits Review Board on many occasions when dealing with post-amendment cases. See *Buckhaults v. Shippers Stevedore Co.,* 2 BRBS 277, BRB No. 75-132 (1975); *Walker v. AAF Exchange Service,* 5 BRBS 500, BRB No. 76-185 (1977); and *Kilson v. Sun Shipbuilding & Dry Dock Co.,* 2 BRBS 172, BRB No. 75-127 (1975).

Petitioner also wrongfully assumes that the mere amendment of an Act is to be used to justify the outright rejection of prior judicial decision, absent any evidence of

congressional intent. Respondent respectfully submits that the petitioner has applied the wrong test to measuring congressional knowledge of judicial decisions. As the Court said in *Cannon v. University of Chicago,* 441 U.S. 677, 696-7 (1979), "It is *always* appropriate to assume that our elected representatives, like other citizens, know the law . . ." (emphasis added). This rule of law, in various forms, has been followed by courts nationwide. "In searching for the will and intent, it is to be assumed that Congress was aware of established rules of law applicable to subject matter of the statute and thus, upon enactment the statute is to be read in conjunction with the entire existing body of law." *Kansas City, Mo. v. Federal Pacific Electric Co.,* 310 F.2d 271, 275 (8th Cir. 1962) *cert. denied* 371 U.S. 912 (1963), *cert. denied* 373 U.S. 914 (1963), 50 Am. Jur. Statutes § 339; *Exploration Company v. United States,* 247 U.S. 435, 449 (1918). "It is a settled rule of statutory construction that a legislature is presumed to act with knowledge of existing law on the subject, and absent a clear manifestation of contrary intent, its enactments are presumed to be harmonious with that existing body of law. " *Finberg v. Sullivan,* 461 F.Supp. 253, 258 (E.D. Pa. 1978). Respondent respectfully submits that this is the correct rule of law to be applied in the case at bar.

Moreover, petitioner's suggestion that the inclusion of a claimant's right to select his initial treating physician remedied all the evils present under pre-amendment law is absurd, as the instant case demonstrates. The 1972 amendments did not address, in any way, what would happen if the employer's physician *refused* to provide treatment. The suggestion that Congress intended to abrogate the *Neuman* decision is without foundation. Therefore, the petition for *certiorari* should be denied.

III. THE COURT OF APPEALS DECISION BELOW MERELY APPLIED A RULE OF LAW ESTABLISHED BY THE ADMINISTRATIVE AGENCY WHEN IT EXCUSED THE RESPONDENT'S DOCTOR'S FAILURE TO PROVIDE MEDICAL REPORTS.

Petitioner's third argument, like its first two, both overstates the breadth of the Court of Appeals holding and fails to recognize the well established principles on which it rests. The Court of Appeals held that the failure of respondent's doctors to file medical reports should have been excused under Section 7(d), 33 U.S.C. § 907(d), as it was "in the interest of justice to do so." 33 U.S.C. § 907(d), *Buckhaults v. Shipper's Stevedore Company*, 2 BRBS 277, BRB No. 75-132 (1975).

It is true that in *Buckhaults* the Board remanded the case to the administrative law judge. However, that case was ". . . remanded to determine whether such a report was filed and if not, whether it is excusable in light of the employer's refusal of further medical care. . .",after the Board found "that the Administrative Law Judge's failure to recognize that the claimant was "refused" further medical treatment negates the finding that there was no justification for the failure to report" *Buckhaults, supra* at 280. Thus, the Board held that the employer's refusal to provide of further medical care precluded a finding that the failure to file the required medical report was unjustified. *See also Shahady v. Atlas Tile and Marble Co.*, 13 BRBS 1007, 1014 App. 35.[9] Again, the Court of Appeals

[9]Requiring filing of the medical reports after a refusal would not aid the employer or deputy commissioner. To expect a claimant to have reports sent to the employer by an unauthorized physician would place an unreasonable burden on the claimant.

did not establish new law, it merely followed the established precedents of the agency itself. Furthermore, there was no need to remand this case for further fact-finding as in *Buckhaults*. With the full record before it, the Court was free to reverse. *Hilyer v. Morrision-Knudsen*, 670 F.2d 208, 214 (D.C. Cir. 1981) *cert. granted* ____ U.S. ____ (October 3, 1982).

CONCLUSION

Given the narrow holding of the Court of Appeals, and its firm foundation in prior administrative and judicial precedent, this Honorable Court should deny the petition for *certiorari*.

Respectfully submitted

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